SUPREME COURT, U. S.

No. 75-45

FILED
JUL 22 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

CLIFTON C. TANG, and AFFY INDUSTRIES, INC.,
Petitioners,

v.

WILLIAM E. CRAVER, JR., HOPE D. CRAVER, THOMAS L. HARVEY, JEREMIAH B. DUFFY, CRAVER INDUSTRIES, INC., and CRAVALUME, INC.,

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

In lieu of opinion the Court of Appeals entered an explanatory judgment order (Pet. App. A, p. 1(j)) referred to in 513 F.2d 626. The three opinions of the district court (Pet. App. D, E, and H, pp. 1(d) - 5(e), and 1(h)) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered April 15, 1975. Rehearing by the panel and *en banc* was denied May 28, 1975. The petition for a writ of certiorari was filed on July 9, 1975. Jurisdiction of this Court is invoked under 28 *U.S.C.* 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly dismissed the appeal as untimely from the judgment entered July 2, 1973, and sustained the district court's denial on remand of an extension of time for filing the notices of appeal *nunc pro tunc* beyond the 30-day period but within the 60-day period provided in Rule 4(a) *F.R.A.P.*, upon detailed findings of fact and conclusions of law determining the neglect to appeal in time inexcusable.

STATEMENT

Petitioners sued respondents for damages; on July 2, 1973, judgment was entered awarding monetary damages to petitioner, Affy Industries, Inc., and dismissing the corresponding claim of petitioner Tang, assignor (Pet. App. A, 1(d) - 2(d)). More than 10 days afterward Affy filed a motion to amend the judgment; no time extension to file the motion was granted; no notice of appeal was filed within 30 days; an *ex parte* motion was filed and granted without findings to extend the time for an additional 30 days (Pet. App. A, 2(d) - 3(d); 1(b) - 3(b)). The Court of Appeals noting in a consolidated order that the *ex parte* motion may have been inappropriate, remanded for a Rule 4(a), *F.R.A.P.* determination and appropriate findings (Pet. App. A, 1(c) - 1(d)).

The district court found inexcusable neglect and denied a time extension (Pet. App. A, 1(d) - 5(e), 1(h)). In its judgment order the Court of Appeals expressly found that the (consolidated) appeal was not timely and referred to the district court's findings of fact and conclusions of law on remand pending appeal, the supplemental memorandum and order, and the letter opinion and order, *supra*, concerning the judgment of July 2, 1973 (Pet. App. A, 1(j)).

ARGUMENT

1. The Court of Appeals correctly ruled – in accord with every other Court of Appeals that has considered the question – that the circumstances shown by the findings of fact and conclusions of law do not amount to excusable neglect or compel a time extension. *Flint v. Howard*, 464 F.2d to 84 (C.A. 1, 1972), *reh. den.*, 464 F.2d 1087 (mere receipt of a tardy motion does not operate as an implied time extension); *Files v. Atty. of Rockford*, 440 F.2d 811 (C.A. 7, 1971); *cf. Maryland Casualty Co. v. Conner*, 382 F.2d 13 (C.A. 10, 1967) and *Buckley v. United States*, 382 F.2d 611 (C.A. 10, 1967), *cert. den.*, 390 U.S. 997 (1968) (under predecessor *F. R. Civ. Pro.* Rule 73(a) and F.R. Crim. Pro. Rule 37(a)(2), respectively); 9 Moore's *Federal Practice* ¶ 204.13 "Power of the District Court to Extend the Time for Appeal [1] – What Constitutes 'Excusable Neglect'" (2nd ed., 1973) pp. 267-274.

Nevertheless, petitioners rely upon the *Thompson-Wolfsohn-Mottler* rationale (Pet. pp. 6, 8).[1]

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[1] *Fairway Center Corp. v. U. I. P. Corp.*, 491 F.2d 1092 (C.A. 8, 1947) (Pet. p. 8), likewise involved the inapplicable situation where the court, within the time for appeal expressly granted an extension of time to file a motion for new trial.

Flint, supra, accurately distinguishes these from the case under review because here there was no extension granted by the court to file the late particularized motion to amend the judgment of July 2, 1973. In fact, the trial judge (later promoted to the Court of Appeals) expressly held the motion untimely (App. A to this brief). Petitioners took no appeal from this order of August 27, 1973 (Pet. App. A, p. 1(a)).

CONCLUSION

The petition for a writ of certiorari should be denied and double costs awarded respondents.

Respectfully submitted,

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Attorney for Respondents.

July, 1975.

APPENDIX A

United States District Court
DISTRICT OF NEW JERSEY
NEWARK, N.J. 07101

R. 110
CHAMBERS OF
LEONARD I. GARTH
JUDGE

August 27, 1973

MEMORANDUM OPINION AND ORDER

Clifton C. Tang, Esq.
228 East Clinton Avenue
Tenafly, New Jersey 07670

Leonard B. Sussholz, Esq.
923 Pennsylvania Building
Washington, D.C. 20004

Re: Tang, *et al. v.* Craver, *et al.*
Civil Action 530-67

Gentlemen:

I have reviewed all of the submissions with respect to plaintiffs' motion made returnable September 10, 1973. In light of the fact that I will not be holding a Motion Calendar on that date, and by reason of the prior filed opinion in this cause, I have found no necessity for hearing oral argument on the return date.

On July 6, 1973 the plaintiffs filed a "Notice of Motion" to amend findings of fact and conclusions of law. That Notice states: "Motion papers and motion brief are being prepared and they will be submitted on time in accordance with the Rules of the court." They were not. In fact, the actual motion was filed on July 20, 1973, some 18 days after the judgment had been entered on July 2, 1973.

F.R.C.P. Rule 52(b) requires that the instant type motion be made within 10 days after entry of judgment. This period cannot be enlarged F.R.C.P. Rule 6(b). The Notice filed on July 6, 1973 might under other circumstances have sufficed as the motion itself (see Rule 7(b)(1)) but the Notice, as filed, was without particularity. Moreover, it states on its face that "Motion papers will be submitted on time." I can only conclude that the instant motion was effectively made on July 20, 1973, – beyond the period of time permitted under Rule 52(b), and as such, must be dismissed as being out of time.

In any event I would deny the motion made by the plaintiffs on the merits, as I am not persuaded by any of the arguments made by the plaintiffs which deal with findings of fact and the conclusions of law.

Under these circumstances and for these reasons as well as for the reasons that were expressed in this Court's opinion filed June 15, 1973.

It is on this 27th day of August, 1973,

ORDERED, that the motion made by the plaintiffs to be returnable on September 10, 1973 be and the same is hereby denied.

The original of this Order shall be filed with the Clerk and constitute the Order disposing of this motion.

Very truly yours,

/s/ LEONARD I. GARTH
Leonard I. Garth
Judge, U.S. District Court

LIG: jer

Original Filed -
Clerk, U.S.D.C.